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Administrative Inconsistency in the Courts

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1. The recent Supreme Court case of *R (Gallagher Group Ltd) v. Competition and Markets Authority* [2018] UKSC 25, [2018] 2 WLR 1583 considered the principle of equal treatment and its application to the conduct of the Competition and Markets Authority (“CMA”) in a dispute over price-fixing in the tobacco market. Elsewhere in this issue of *Judicial Review*, there is a comprehensive treatment of the doctrinal components of the case.¹ In this note, we consider two points in the judgment that we suggest are cause for wider reflection by administrative lawyers. First, the nature of the exercise of “tidying up” the grounds of judicial review undertaken by Lord Carnwath and, second, Lord Sumption’s discussion of “wider duties” attaching to public authorities “charged with enforcing the law” (para. 46).
2. The dispute considered in *Gallagher* resulted from an investigation by the Office of Fair Trading (“OFT”) into alleged price-fixing in the tobacco market (the OFT was subsequently replaced by the CMA). As Lord Sumption recognised, such investigations are “notoriously difficult without inside information or the active co-operation of at least one participant and are not necessarily straightforward even then” (para. 46). In this context, Early Resolution Agreements (“ERAs”) are often used to settle disputes by consent quickly, with the party under investigation benefitting from a reduced penalty. As an administrative tool, ERAs have the potential to “enable an investigation to be conducted expeditiously, economically and fairly” (para. 46). In the course of the investigation considered in *Gallagher*, multiple parties entered into ERAs with the OFT, with the parties admitting fault and benefiting from lesser penalties. One provision of the ERA was that the parties could pursue an appeal (though if that option was taken, the OFT would increase the fine and pursue costs). One party – TM Retail (TMR) – enquired during the course of the investigation as to whether it could benefit – in the sense of a refund along with a contribution to costs and interest – from a successful appeal by one of the other parties. Due to an official error, TMR were assured this would be the case. Subsequently, some of the other parties successfully appealed and the OFT honoured its assurance to TMR. This resulted however in another group of parties who were subject to ERAs, but who did not appeal and were not given such an assurance, feeling hard done by. The refusal of the CMA to replicate their assurances direct

¹ [Citation required for other article in issue].

elsewhere in favour of this group was the subject of the challenge in *Gallaher*, where the Supreme Court ultimately found the CMA's approach to be lawful.² Though the group received different treatment to TMR, this was said to be justified for several reasons (para 44 (Lord Carnwath); para 56 (Lord Sumption); para 63 (Lord Briggs)). First, it was a mistake in the first place to give the assurance to TMR who, second, had the assurance been rescinded, would have likely succeeded in convincing a court to hear an appeal out of time and would have succeeded on the substantive argument given the precedence set by the other appeal. Third, the group had not lobbied for the same assurance as TMR had in 2008.

3. In his judgment, Lord Carnwath spent some time “tidying up” the language used to articulate the grounds in *Gallaher*. In relation to the principle of equal treatment, he held that it is not a free-standing principle of administrative law but a claim derived from existing grounds such as rationality (para. 24):

Whatever the position in European law or under other constitutions or jurisdictions, the domestic law of this country does not recognise equal treatment as a distinct principle of administrative law. Consistency, as Lord Bingham said in *[R (O'Brien) v Independent Assessor]* [2007] 2 AC 312, para 30], is a “generally desirable” objective, but not an absolute rule.

Lord Carnwath also commented on the use of broad concepts such as “fairness” in administrative law: “[f]airness, like equal treatment, can readily be seen as a fundamental principle of democratic society; but not necessarily one directly translatable into a justiciable rule of law” (para. 31). The cases on fairness show, he suggested, “how misleading it can be to take out of context a single expression, such as “conspicuous unfairness,” and attempt to elevate it into a free-standing principle of law” (para. 40). In all of the cases reviewed in the judgment, there was a ground — “unfairness,” “conspicuous unfairness” or “abuse of power” — which described the conclusion reached by the judge (para. 37). The implication here is that cases should no longer be argued solely in the language of abuse of power or conspicuous unfairness but rather must be anchored to an established ground for review—such as rationality or legitimate expectation. In support of Lord Carnwath’s analysis, Lord Sumption agreed that (para. 50):

In public law, as in most other areas of law, it is important not unnecessarily to multiply categories. It tends to undermine the coherence of the law by generating a mass of disparate special rules distinct from those applying in public law generally or those which apply to neighbouring categories.

² Contrary to the Court of Appeal, see: [Gallaher Group Ltd v. Competition and Markets Authority](#) [2016] EWCA Civ 719, [2016] Bus LR 1200.

Lord Sumption concluded that, while there is a “common law principle of equality,” it is still “usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities” (para. 50).

4. All of these remarks are about the form, and language, that ought to be used to express the grounds of judicial review. As has been argued elsewhere, “language plays a useful descriptive role in administrative law, setting out a landscape that can be comfortably viewed and usefully discussed from 20,000 feet.”³ Recent decades have seen traditional language frameworks in administrative law replaced and supplemented by more “open-textured” terms such as “fairness.”⁴ For some, the contemporary language of judicial review is an unruly mess and there is a need to tidy it up; to get rid of concepts that are simply clutter and to organise properly those that have value. For others, messiness is a palatable part of a pragmatic approach to judicial review.⁵ *Gallagher* can, at least superficially, appear to be the restoration of a more clear-cut approach to grounds. What is more important however is the extent to which the judicial *function* is changing as the language of administrative law changes.
5. The relationship between legal language and judicial function is a complex one. It has often been the case that changes in language have corresponded with changes in function. Equally, however, language can change but actual function can change little.⁶ The key point here is that changing language in judgments is only a reliable indicator of a changing judicial function to a certain extent, and it is certainly not a perfect measure.⁷ It is difficult to see the ruling in *Gallagher* as changing the judicial function in any serious way. This was common ground in the judgment (paras. 26, 40 and 41 (Lord Carnwath) and para. 50 (Lord Sumption)). Indeed, the restoration of the “ordinary” judicial review grounds and the maintenance of the contemporary judicial function can take us to a place where, although the language appears simpler, the retained concepts become more flexible and ambiguous.⁸ That state of affairs—and that seems to be what *Gallagher* moves us towards—would cut across many of the key rationales of clarity and legal

³ Paul Daly, “*The Language of Administrative Law*” (2016) 94 *Canadian Bar Review* 519, p.522.

⁴ *Ibid.*

⁵ For instance, contrast the approaches to substantive legitimate expectations in: Jason Varuhas, “In Search of a Doctrine: Mapping the Law of Legitimate Expectations” in Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart, 2016); Joe Tomlinson, “The Narrow Approach to Substantive Legitimate Expectations and the Trend of Modern Authority” (2017) 17(1) *Oxford University Commonwealth Law Journal* 75.

⁶ Which may result in what Chintan Chandrachud, writing in the context of judicial review in India, labels “fictitious” doctrines, see: “The (Fictitious) Doctrine of Legitimate Expectations in India” in Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart, 2016).

⁷ See for instance: Dan Simon and Nicholas Scurich, “Judicial Overstating” (2013) 88 *Chicago-Kent Law Review* 411.

⁸ Jeffrey Jowell and Anthony Lester “Beyond *Wednesbury*: Substantive Principles in Administrative Law” [1987] *Public Law* 368.

certainty put forward by those who would prefer restoration of a more clear-cut approach to grounds.⁹

6. Beyond Lord Carnwath's attempt at "tidying up" the grounds of review, *Gallagher* also saw three brief concurring judgments and amongst them was an interesting comment from Lord Sumption. In relation to the CMA, he stated that a "competition authority is not an ordinary litigant, but a public authority charged with enforcing the law. It therefore has wider responsibilities than the extraction of the maximum of penalties for the minimum of effort" (para. 46). He continued by offering some examples: "[a] party under investigation must not be subjected to undue pressure to make admissions. Nor can it be deprived of any statutory right of appeal against the ultimate decision" (para. 46). There are, at least, two interesting dimensions to this *obiter* comment which warrant further reflection.
7. First, this statement adds nuance to rulings directed at other, similar administrative bodies. In particular, in several significant tax cases, where at issue was the use of HMRC's managerial discretion,¹⁰ the courts have affirmed that HMRC may use its discretion to collect the maximum amount of tax due having regard to resources.¹¹ That has been taken at times by HMRC to be the guiding principle as to how the managerial discretion ought to be exercised.¹² Lord Sumption's statement adds an important layer of nuance not explicit in the previous tax cases. Specifically, that public authorities may make decisions which seek to maximise revenue having regard to resources, but that is not a statement of a rule, and hence a demarcation of the limits of its overarching discretion. Rather, it is an example of a rational use of discretion in particular circumstances. Thus, a public authority should not *always* use its powers to maximise certain outcomes as it has "wider responsibilities" (para. 46).
8. The distinction that Lord Sumption is trying to draw by identifying the CMA as "not an ordinary litigant" due to the fact it is "charged with enforcing the law" is, however,

⁹ For comments along these lines in relation to *Gallagher*, see: Mark Elliott, "Consistency as a free-standing principle of administrative law?" (15 June 2018), available at: <https://publiclawforeveryone.com/2018/06/15/the-supreme-courts-judgment-in-gallagher-consistency-as-a-free-standing-principle-of-administrative-law/> accessed 19 August 2018.

¹⁰ The discretion is derived from Commissioners for Revenue and Customs Act 2005, s. 5 which provides that HMRC is responsible for the collection and management of taxes and credits.

¹¹ *IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 626 (Lord Diplock), *R (Wilkinson) v. IRC* [2005] UKHL 30, para 21 (Lord Hoffmann); [2006] STC 270, and *R (Davies) v. HMRC*; *R (Gaines-Cooper) v. HMRC* [2011] UKSC 47, [2012] 1 All ER 1048, para 26 (Lord Wilson).

¹² See for instance HMRC, *Resolving tax disputes: Commentary on the litigation and settlement strategy* (October 2017) [8], [16] and [17]. HMRC, *ADML1300 Incorrect Advice to Customers: When incorrect advice can be binding* (July 2016), available at: <https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml1300> accessed 19 August 2018; HMRC, *ADML 4300 Extra-statutory concessions: Deciding whether an extra-statutory concession can be made* (July 2016), available at: <https://www.gov.uk/hmrc-internal-manuals/admin-law-manual/adml4300> accessed 19 August 2018.

unclear. On one reading, Lord Sumption is contrasting private citizens at litigants with public authorities as litigants. This is nothing more than a general reminder of the existence of well-established administrative law principles. On another reading, however, Lord Sumption could be understood to be identifying the CMA as belonging to a special category of public authority that are “charged with enforcing the law.” This latter reading can be supported by how the examples of duties he offers seem to relate to what the CMA does, *e.g.* a “party under investigation must not be subjected to undue pressure to make admissions” (para. 46). If this reading is correct and Lord Sumption is suggesting particular “wider responsibilities” attach to public bodies similar to the CMA, this is a more (if not entirely) novel claim.

9. Every administrative authority is, at least in principle, a law enforcement body. At a very basic level, it is the nature of the administration’s task to implement laws passed by Parliament. It would be somewhat confusing therefore for Lord Sumption to use the idea of the CMA having the job of “enforcing the law” to ground his claim that the CMA belongs to a particular class of public body. Potentially, the distinction is seeking to identify a category of public bodies which take *punitive* action (*e.g.* the imposition of penalties) and to which certain responsibilities would attach (this reading seems to correlate with the examples of the duties he supplies). However, this suggestion could have very far reaching implications indeed. Take, for instance, the inherently punitive exercise undertaken by the Department for Work and Pensions when they impose benefit sanctions.¹³ If the common law is to impose particular duties *vis-à-vis* punitive administrative action, surely those duties may extend to areas of government activity such as the benefit sanctioning regime too? There is some history of the courts developing particular common law standards in relation to punitive administrative action.¹⁴ Lord Sumption has also alluded previously, in *Bank Mellat v HM Treasury* (No 2) [2013] UKSC 39 (para. 83), to the existence a principle which “has roots in the common law... where administrative acts of an oppressive or penal character have been quashed as being disproportionate.” Yet there has never been properly developed common law jurisprudence on the “wider responsibilities” which may attach to punitive administrative action. If one is to be developed, and preferably before, the significant implications and scope of such reasoning for both the courts’ role and administration’s functioning must be thought out clearly.

¹³ Michael Adler, *Cruel, Inhuman or Degrading Treatment? Benefit Sanctions in the UK* (Palgrave Macmillan, London 2018).

¹⁴ See *e.g.* *R v. Barnsley Metropolitan Borough Council ex p Hook* [1976] 1 WLR 1052.